IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL FIRST APPEAL No. 110 of 1989

MAHESHWARI FERTILIZER & ENGINEERS MERTA
V/S
BAKSHA RAM & ANR.

Mr. RR NAGORI, for the appellant / petitioner

Mr. RAM KISHORE SONI for Mr. INDER RAJ CHOUDHARY, for the respondent

Date of Order : 23.8.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This appeal has been filed by the plaintiff against the judgment and decree of the learned District Judge, Merta dt. 7.3.1989, dismissing the plaintiff's suit for recovery of Rs. 10,100/-.

The facts of the case are, that the plaintiff filed the present suit, alleging interalia, that the plaintiff Harnarayan carries on business in the name and style of M/s. Maheshwari Fertilizers and Engineers, as a sole proprietor, the defendants are father and son, living in a joint Hindu Family, and are bound by the acts of each other. With this it is alleged, that on behalf of the defendants, defendant no.2 desired to purchase an electric pumping set, and other related articles for installation on their joint family well, whereupon the plaintiff offered to

give it subject to payment of Rs. 2/- per hundred as interest per month, being prevalent business custom. Accordingly on 24.11.1976 the defendant no.2 purchased the articles mentioned in para-3 of the plaint worth Rs. 6176/- on credit, for and on behalf of defendants, for which a challan and a bill was prepared, and given to defendant no.2, who appended his signature on the challan, the plaintiff made corresponding entries in his books of accounts, which also have been produced along with challan and bill. According to the plaintiff the defendant paid Rs. 300/- on 26.5.1977, but did not pay the rest of the amounts despite demand, and despite notice being served on Baksha Ram, the defendant no.1, while the notice of defendant no.2 was returned, on account of his not being available. Accordingly, the plaintiff has claimed a sum of Rs. 5876/- as principal, and Rs. 4218/- as interest.

The defendants filed a written statement contesting the suit, alleging interalia, that the defendants never purchased any goods on credit. However, the goods were purchased vide bill no. 618 dt. 24.11.1976 worth Rs. 6176/-, but then the defendant Shanker Ram made payment of the price to the plaintiff then and there, and the plaintiff gave a cash payment bill, photostat copy whereof was purportedly filed along with the written statement. It was pleaded that if the things would have been sold on credit, it would have been so mentioned in the

bill, which is not mentioned, and regarding the books of accounts, it was pleaded, that they are plaintiff's books of accounts, and he is free to make whatever entry he likes to make. Receipt of the notice was denied. Thus it was pleaded, that nothing is outstanding, and the suit is wrongly filed, and thus special cost has been claimed.

The learned trial court framed three issues. The first issue was, as to whether the defendant purchased the goods by making cash payment on that very day, therefore, the suit is liable to be dismissed. Second issue was about the defendant's entitlement for special cost. The third issue related to relief. Since the burden of all the issues was on the defendant, the defendant led his evidence first, wherein he examined himself, and produced Rai Chand, the Sarpanch as D.W.2, and tendered in evidence Ex.A-1, claimed to be a receipt of purchase of the goods, while the plaintiff examined himself in rebuttal, and tendered in evidence the challan Ex. 1, bill Ex.2, the copies of the books of accounts being Ex.3, 4 and 5, and some other documents regarding sending of notice.

Learned trial court deciding issue no.1 found, that the defendant has proved issue in his favour, as the evidence of defendant Shanker Ram is corroborated by the evidence of Rai Chand, D.W.2, while the statement of the plaintiff is not corroborated by any other oral or other

documentary evidence. Regarding Ex.1 and 2 it was observed, that they do not contain any entry about the things having been sold on credit, and the plaintiff has not produced any cash memo. So far the payment of Rs. 300/- is concerned, the payment is not signed by Baksha Ram, nor has been got signed by the person who made the payment. Likewise, the books of accounts, being Khata, and cash book, were found to be baseless in absence of corroboration, and that, simply on the basis of the books of accounts, it cannot be believed, that the goods were sold on credit. Then, it was also observed, that the plaintiff has claimed, that the things were given on credit on account of slip of the Sarpanch, but then that Sarpanch has not been produced, and the slip has also not been got proved. Therefore, it looks to be unnatural, that the plaintiff would give things to the defendant, without any acquaintance, with the result, that the suit has been dismissed as above.

Arguing the appeal it was contended, that during pendency of the suit, the plaintiff had filed an application under O. 13 Rule 2, on 25.11.1988, and the learned trial court had dismissed that application by observing, that there is no reference about this document in the plaint, and it appears that the slip has been subsequently prepared, there is no circumstance to show its genuineness, and thus it was found not to be genuine, and the application was rejected. According to the learned

counsel, the learned trial court was in error in rejecting this application, and the document was required to be taken on record, more particularly when, in the judgment itself, learned trial court has referred to the slip, and has disbelieved it, simply by observing, that the slip has not been got proved, nor the Sarpanch has been produced, meaning thereby, that the learned trial court has considered the slip, while since the application under O. 13 Rule 2 has been rejected, the plaintiff could not prove it, and therefore, the order dt. 25.11.1988 passed by the learned trial court is required to be set aside, and consequently the impugned judgment and decree is also required to be set aside.

Other submission made is that from perusal of the record, it is clear that Ex. 1 is not a bill but is a challan, and there is nothing to show from Ex.1, that it was a cash memo, or that the payment was received on that day. Significantly Ex. 1 is signed by the defendant Shanker Ram. Then, Ex.2 which was also prepared on the same day is clearly credit memo no. 806, while had the things been sold on cash basis, the credit memo would not have been issued. In this background the books of accounts produced by the plaintiff are required to be believed to show that the goods had been sold on credit, and the suit has rightly been filed. The other submission made is, that a look at Ex. A-1, as produced by the defendant, would show, that it

is the same document as Ex.1, and the defendant in the written statement has come with a story of this being a bill of cash payment, as pleaded in para-3 of the written statement, and photostat copy has been produced, original thereof is Ex.A-1, and a look at this Ex.A-1 shows, that it is a challan, and admittedly bears signature of Shanker Ram at A to B, and there is nothing on this document to show, that either it was a cash memo, or that payment was made on that date. Thus, even from Ex.A-1, the plaintiff's case is substantiated rather established. The next submission made is, that Ex.A-1 is a document which is pasted on the paper, and thereby the document has been interpolated by the defendant, on which aspect the defendant was cross examined in detail, and was clearly put that the defendant had come to the shop of the plaintiff after some days of the purchase of the goods, on which occasion the interest on outstanding amount was calculated, and the outstanding amount was mentioned on the reverse side of Ex.A-1, and in order to conceal, that the defendant has pasted the document on the paper. This suggestion has of course been denied by the defendant. According to the learned counsel, thereupon the plaintiff filed an application on 6.2.1986, contending, that Ex.A-1 is a challan memo, on the reverse side whereof the calculation of interest has been made and outstanding amount has been mentioned, but the defendant has pasted it on a paper to conceal it, and therefore till recording of the statement, the document be kept in safe

custody, and at the time of plaintiff's statement it be opened, so that the plaintiff may prove the existence of the amount, on the back side of Ex.A-1, but then the learned trial court did not open the document, and requested, that if possible, this Court may make an earnest attempt to open the document, and arrive at the truth. Interalia on these submissions, it was prayed that the appeal be allowed, and the suit be decreed.

Learned counsel for the respondent contended that the order dt. 25.11.1988 passed by the learned trial court dismissing the application under O. 13 Rule 2 has not been challenged by the plaintiff in the appeal, and therefore, that order cannot be set aside. Likewise, it was also contended that to the defendant or Rai Chand it was not suggested by the plaintiff, that Rai Chand did not come at the time of purchase of the goods and/or that Shanker Ram had come to purchase the goods with slip of Rai Chand. Not only that, there is no pleading in this regard, and even in the examination in chief the plaintiff has not said anything about this slip, rather it was in cross-examination, that it was introduced by the plaintiff, that the defendant had come with a slip of Rai Chand. The statement of the plaintiff were recorded on 25.11.1988, and on that day itself the application was filed under O. 13 Rule 2, which clearly shows that the document was subsequently cooked up by the plaintiff, and in order to

introduce that document, in cross-examination he introduced the story of slip, and therefore, the learned trial court rejected the application under O. 13 Rule 2. It was also pointed out, that though the application has been filed before this Court under O. 41 Rule 2 C.P.C. seeking to challenge the order dt. 25.11.1988, then no notice of that application has ever been issued by this Court, which would have been issued, had the plaintiff pressed his application filed on 7.8.1989, and therefore, there is no occasion for allowing the plaintiff to challenge the order dt. 25.11.1988, now.

Arguing on merits, it was contended, that the plaintiff has not proved the signature of the defendant on Ex.2, and on Ex. 1 it is not mentioned that the goods were sold on credit, and the plaintiff has not produced Bhagu Ram with whom, the defendant is said to have remitted Rs. 300/-, and therefore, it cannot be said that the goods were sold on credit, as against which the defendant and D.W.2 has clearly established, that cash payment was made to the plaintiff on that very day. Regarding opening of the document Ex.A-1, learned counsel for the respondent submitted, that the appeal may simply be dismissed. However on asking the specific stand on the appellant's request for opening the document Ex. A-1, it was submitted that there is no pleading of the plaintiff in this regard, that any accounting was done, or any entry was made on the reverse

side of Ex.A-1, and even during course of recording statement, he never pressed before the learned trial court to open reverse side of Ex.A-1, and there is no justification for opening it, apart from the fact, that any attempt in opening reverse side of the document by this Court may entail the risk of damaging the document Ex.A-1, as well.

I have considered the submissions, and have perused the record. During the course of hearing I made a very sophisticated attempt to peel out the paper pasted on the reverse side of Ex.A-1, and could remove the paper, substantially opening the writing made on the reverse side. (The pieces of paper as removed from back side have been placed in an envelope on record.) Thereafter again, the learned counsel for the respondent submitted, that since there is no pleading in regard to this writing, these writings are of no consequence in favour of the plaintiff.

I have considered these submissions as well.

In my view, the learned trial court was in error in deciding issue no.1 in the manner it has been decided, and the finding is required to be set aside.

In this regard it may be noticed, that the learned trial court has proceeded with the conclusion of the

defendant having proved the issue no.1 by oral testimony, by himself, and D.W.2 Rai Chand, and that the statement of P.W.1 is not corroborated by any oral or documentary evidence. Likewise it has also been observed, that in Ex.1 and 2 there is no entry about goods having been sold on credit, and that the plaintiff has not produced the cash memo in the Court. In my view, these basic findings are wrong, inasmuch as, when the plaintiff has come with a case of goods having been sold on credit, there is no question of plaintiff producing cash memo, as expected by the learned trial court. Then, so far as Ex. 1 and 2 are concerned, the finding is again outcome of misreading of document, inasmuch as, Ex. 2 clearly shows to be "Credit Memo No. 806" which is obviously an antithesis of cash memo. Then Ex.1 and Ex.A-1 are the same documents, and the defendant has admitted his signatures to be at A to B on Ex.A-1. About this document, it is significant to note, that the defendant has come with a categoric case about this Ex.A-1 being the bill of cash payment of the goods, while a look at Ex.A-1 shows, that it is not a bill, but it is only a challan. Obviously had the goods been sold on cash basis there was no occasion for appending signatures of the purchaser. No document has been produced by the defendant, which may show, that the goods have been sold on cash basis. Of course, the defendant has deposed by word of mouth, and also produced D.W.2, to corroborate him, but then, the removal of the paper pasted on the back side of

the document Ex.A-1, makes million dollar revelations. Since the paper was not opened by the learned court below, the plaintiff could not explain the significance of the contents of entry, and therefore, I asked learned counsel for the respondent, as to whether he would like to have the matter remanded to the learned trial court, so that the things may be clarified by both the parties, by producing evidence, but then the learned counsel simply submitted that the appeal is required to be dismissed. In that view of the matter I have seen the entries existing on the reverse side on Ex.A-1. In this background a look at the statement of the defendant D.W.1 does clearly show, that he was clearly put, that after some time of purchase of the goods the defendant had come on the shop of the plaintiff to settle the account, and thereupon the interest was calculated, and entry was made on the reverse side of Ex.A-1, and in order to conceal that, the paper has been pasted on the reverse side of Ex.A-1. In this sequence I find, that in the writings on the reverse side of Ex. A-1, on the top, the figures 6176 is mentioned, then that is multiplied by figure 6, mentioning the date 25.5.77, then the resultant figure is again multiplied by 2. This shows, that interest at the rate of 2 per cent per month is calculated on the price of the goods for a period of six months, from 24.11.76 to 25.5.77, and then out of this, after deducting Rs. 300, the balance amount is mentioned as Rs. 6810. There are some more figures mentioned in the document, but then,

in view of the gum pasted on it, those entries could not be deciphered, but then the above mentioned figures do clearly make out, that in May, 1977 the interest was calculated on the outstanding amount, and after crediting the amount of Rs. 300/- outstanding amount of Rs. 6810/- was arrived at, which on the theory of preponderance of probabilities, does show to be the calculation of outstanding amount, which obviously would not have been there, had the goods been purchased on cash basis. From a naked eye view of Ex.A-1, it is writ large, that it is in order to conceal these calculations, that the defendant has pasted the paper on the document, and while in the witness box had the audacity to deny the suggestion about having pasted the document to conceal these entries. Thus, on the face of it, it is clear, that the defendant had no regard for truth. May be that if I would not have attempted to open the reverse side of the document, I might have been swayed away to believe the defendant on his face value, but the revelations made by opening of the document, do clearly show, that the defendant has no regard for truth at all. In that view of the matter, in view of the existing entry on the reverse side of Ex.A-1, the bare ipse dixit of the defendant, purportedly corroborated by Rai Chand D.W.2, about having made cash payment for purchase of the goods cannot at all be believed. Even at the cost of repetition I may observe that it can be not believed, also because, as noticed above, the defendant has come with story of Ex.A-1 being a

bill of cash payment, which it is not. Thus, on the appreciation of Ex.1, Ex.2, Ex.A-1, in conjunction with the statements of D.W. 1 and D.W.2, and P.W.1, on the preponderance of probabilities, in my view, it is established, that the plaintiff has sold goods to the defendant on credit, and the version of the plaintiff is more reliable, than that of the defendant, and thus, finding of the learned trial court on issue no.1 is not sustainable.

In view of the above conclusions I have arrived at above, de hors the slip attempted to be produced by the defendant, I would not go into the question of deciding the the application filed by the appellant under O. 41 Rule 2 C.P.C.

The net out come of the aforesaid discussion is that I am constrained to set aside the impugned judgment and decree. Accordingly, the appeal is allowed. The impugned judgment and decree is set aside, and the plaintiff's suit is decreed for principal amount of Rs. 5876/-. So far interest is concerned, the plaintiff has calculated the amount in the suit by calculating interest @ 2 per cent per month, which in my view is not proved on record, as there is no stipulation of interest contained in Ex.-1, and it has not been put to the defendant, that the interest @ 2 per cent was agreed upon, of course, in the

calculations made on the reverse side of Ex.A-1, interest does appear to have been calculated @ 2%, but then, since I have considered those entries only for the purpose of judging the reliability of conflicting versions, the plaintiff, at best, should be held entitled to interest as permissible by Section 34 C.P.C. Accordingly, the plaintiff is held entitled to interest on the aforesaid principal amount, at the rate of 6% per annum, from 24.11.76 till filing of the suit, and till realisation. The plaintiff shall also get costs of litigation of both the Courts.

(N P GUPTA),J.

/Sushil/